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**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT COURT OF NEVADA**

DENNIS MONTGOMERY, an individual; and  
MONTGOMERY FAMILY TRUST, a California  
Trust,

Plaintiffs,

vs.

ETREPPID TECHNOLOGIES, L.L.C., a Nevada  
Limited Liability Company; WARREN TREPP,  
an individual; DEPARTMENT OF DEFENSE of  
the UNITED STATES OF AMERICA; and  
DOES 1 through 10,

Defendants.

AND RELATED CASE(S)

Case No. 3:06-CV-00056-PMP-VPC  
**Base File**

3:06-CV-00145-PMP-VPC

**ETREPPID TECHNOLOGIES, L.L.C.'S  
AND WARREN TREPP'S  
MEMORANDUM PURSUANT TO  
MAY 16, 2008 MINUTES OF THE  
COURT**

eTreppid Technologies, L.L.C. and Warren Trepp (hereinafter referred to collectively as  
“eTreppid”), hereby submit their Memorandum Pursuant to May 16, 2008 Minutes of the Court.

**I. INTRODUCTION: MONTGOMERY'S BAD FAITH IN SEEKING TO FURTHER  
DELAY DISCOVERY**

Montgomery's "Emergency Request" for a status conference is nothing more than a transparent and bad faith attempt to further delay eTreppid's efforts to take discovery in this matter. The discovery requests at issue have been pending, in some instances, since the autumn of 2006. Despite Montgomery's efforts to prevent eTreppid from taking virtually any discovery in this matter, on February 21, 2008, this Court ordered Montgomery to produce the subject documents by March 14, 2008. Montgomery refused to comply with this Order, and on May 7, 2008, in response to eTreppid's motion for sanctions, this Court ordered Montgomery to produce the subject documents on or before May 19, 2008.

Despite the fact that Montgomery has been under court order to produce the subject documents since February 21, 2008, he has waited until less than one week before the Court-ordered production deadline of May 19, 2008, to advise the Court that he is unable to provide the subject documents in a timely manner because of the amount of effort involved in complying with the United States Protective Order.<sup>1</sup> The timing of the present "Emergency Motion" alone is sufficient to demonstrate the bad faith with which Montgomery has approached his discovery obligations in this matter. This bad faith is confirmed by the remaining circumstances in this matter.

The United States Protective Order, which was entered on August 29, 2007, provides that only very limited information is subject to protection. Specifically, the Protective Order prohibits the disclosure of (1) the existence or non-existence of any relationship between either of the parties and any intelligence agency, and (2) any actual or proposed intelligence agency interest in, application of, or use of the technology or software at issue in this case. The protective order specifically identifies certain categories of documents that are not covered by the protective order, including the technical specifications of the subject technology, the existence and nature of the "Big Safari" contract, etc.

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<sup>1</sup> Montgomery's assertion that he has approximately 1.5 million pages of responsive documents – the bulk of which could only have come from eTreppid – is especially ironic in light of Montgomery's testimony, at the preliminary hearing, that he did not take "files or hard drives or anything" from eTreppid. Transcript of Hearing on eTreppid's Motion for Preliminary Injunction, Vol. II, 194:17-19.

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1           Given the limited scope of the protective order, Montgomery's suggestion that he is in  
2 possession of hundreds of thousands of documents that are covered by the protective order is simply  
3 not credible and raises the additional question of where these documents came from, if not from  
4 eTreppid during Montgomery's tenure as its Chief technology Officer. Montgomery has asserted that  
5 many of these documents are in electronic form. As such, Montgomery – who has previously stated  
6 under oath that he is a computer scientist with decades of experience – could surely conduct electronic  
7 searches to determine whether or not the subject documents contain any information which he, in good  
8 faith, believes falls within the scope of the United States Protective Order. Montgomery has had three  
9 months to engage in this process; he should not be allowed further to delay his discovery obligations  
10 based on his last minute incredible claim that the task is too burdensome.

11           Indeed, most of the categories of documents that this Court ordered Montgomery to produce  
12 cannot possibly contain any information that is subject to the United States Protective Order. For  
13 example, documents relating to Montgomery's attempts to market the software to third parties after he  
14 left eTreppid should not contain such information. As Montgomery demonstrated during the  
15 preliminary injunction hearing, he was aware of his confidentiality obligations since the beginning of  
16 this matter, and he surely would not have breached these obligations by disclosing classified  
17 information to third parties in the course of his attempts to license or sell technology following his  
18 termination from eTreppid. Likewise, any documents sent to the Wall Street Journal or any other news  
19 organizations should not contain any confidential information. Similarly, the faces of the 168 CDs that  
20 the FBI returned to Montgomery in April 2007 are highly unlikely to contain any confidential  
21 information. As such, there is simply no reason why Montgomery should be relieved of his obligation  
22 to produce such documents immediately.

23           Moreover, as the United States noted in its Memorandum Pursuant to May 16, 2008 Minutes of  
24 the Court, the United States has offered to meet with Montgomery to discuss the scope of  
25 Montgomery's discovery obligations, and to discuss the use of search terms to facilitate the  
26 identification of documents that could fall within the scope of the United States Protective Order.  
27 Montgomery has refused this offer. eTreppid submits that Montgomery's refusal to engage in serious  
28 discussions with the appropriate government personnel demonstrates that he is not attempting in good

1 faith to produce documents in a manner which complies with the United States Protective Order.  
2 Rather, he is attempting to avoid his discovery obligations by hiding behind a bogus interpretation of  
3 the requirements of that order.

4 This court should not allow Montgomery's continued gamesmanship to avoid complying with  
5 its clear order. Accordingly, eTreppid respectfully requests that this Court enforce its February 21,  
6 2008 and May 7, 2008 orders and require Montgomery to produce the subject documents immediately  
7 or face further discovery sanctions.

8 **II. DISCUSSION OF SPECIFIC TOPICS IN THIS COURT'S MAY 16, 2008 ORDER**

9 (1) Montgomery has an obligation, pursuant to Fed. R. Civ. P. 34(b)(2)(E)(i), to either  
10 "produce documents as they are kept in the usual course of business or must organize and label them to  
11 correspond to the categories in the request." Under the circumstances in this case, Montgomery cannot  
12 possibly assert that he will produce documents as they are kept in the ordinary course of business; he  
13 has acknowledged that during the course of the FBI's search of his property, the manner in which he  
14 kept his electronic files was disturbed. Accordingly, Montgomery must organize and label the  
15 documents to correspond with eTreppid's specific discovery responses.

16 (2) To the extent that Montgomery's production is to be staged, eTreppid suggests the  
17 following steps:

18 (a) Montgomery immediately produce those categories of requested documents that  
19 cannot contain confidential information, including:

- 20 • Documents related to Montgomery's attempts to market the subject technology  
21 after January 19, 2006 (eTreppid's First Set of Requests, for Production, Req.  
22 Nos. 30 and 31, and eTreppid's Second Set of Requests for Production, Req.  
23 Nos. 24, 25, 26, and 27). These documents include evidence of payments made  
24 to Montgomery by Blixseth, Opspring, AziMyth, or Sandoval, or any third  
25 parties; communications between Montgomery and those parties, and any  
26 contracts between Montgomery and those parties. Because none of these parties  
27 has a classified clearance, none of the communications with these parties should  
28 be classified.

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- Documents provided to the Wall Street Journal, NBC, or any other news organization. (eTreppid's Second Set of Requests for Production, Req. Nos. 22 and 23). As these documents were provided to media outlets, they cannot possibly contain any information within the scope of the United States Protective Order.<sup>2</sup>
- Photocopies of the faces of the approximately 168 CDs returned to Montgomery by the FBI, as well as copies of the contents of any of the CDs that are labeled as eTreppid property. To the extent that Montgomery has a good faith concern that such CDs may contain information falling within the scope of the United States Protective Order, he should be ordered to (1) provide a copy of the CDs to the court immediately, to insure the integrity of the CDs, and (2) within two weeks, meet and confer with the United States Government regarding search terms for confidential information, and provide copies of the subject CDs (with any confidential information removed) to eTreppid.
- The requested white papers, Power Point presentations, and marketing documents also are unlikely to contain any information falling within the scope of the United States Protective Order. These documents should be produced immediately.

(b) Any documents not falling in the above categories should be produced as soon as possible following the below procedure:

- Montgomery should meet and confer immediately with authorized representatives of the United States Government to develop a list of search terms that will assist in locating potentially classified documents.
- After Montgomery has used the search terms to conduct an electronic search for potentially classified documents, he will immediately produce any documents that did not contain any of the subject search terms.

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<sup>2</sup> Montgomery has asserted that he does not possess hard copies of any such documents. This raises significant concerns on eTreppid's part that evidence has been spoliated. However, eTreppid cannot investigate this issue until the subject documents are produced.

- Montgomery will then review any potentially classified documents containing any of the search terms to determine if the documents may fall within the scope of the United States Protective Order, and provide any such documents to the United States for review.

(c) To the extent Montgomery fails to comply with the above schedule, he should face terminal sanctions.

(3) The remaining inquiries stated in this Court's May 16, 2008 order appear to be directed to Montgomery and the United States.

### **III. MONTGOMERY SHOULD BE SANCTIONED FOR BRINGING THE PRESENT EMERGENCY MOTION**

Montgomery has had several opportunities to assert that because of the burden imposed by the United States Protective Order, he is unable to comply with the Court's February 21 Order. Montgomery could have made this argument in (1) his Opposition to eTreppid's Motion to Compel, (2) his Objection to the Magistrate's February 21, 2008 Order, or (3) his Opposition to eTreppid's Motion for Sanctions. Montgomery failed to do and instead elected to wait until the eleventh hour to file the present "Emergency Motion." Moreover, as demonstrated by the United States' Memorandum Pursuant to May 16, 2008 Minutes of the Court, Montgomery has failed to make a reasonable effort to resolve any difficulties in complying with this Court's discovery orders by conferring with appropriate representatives of the United States. Under these circumstances, eTreppid submits that this Court should Order Montgomery to pay any attorneys fees incurred by eTreppid and by the United States in responding to the present "Emergency Motion."

### **IV. CONCLUSION**

Montgomery has acted with the utmost bad faith. Montgomery has already filed several motions to prevent eTreppid from taking the subject discovery. Now, at the eleventh hour – nearly three months after this Court first ordered the subject documents produced – Montgomery states that he cannot comply with this Court's order because of the burden imposed on him by the United States Protective Order. However, Montgomery has made virtually no effort to work with the United States in good faith to satisfy his obligations under the Protective Order. This gamesmanship must end.

1 Accordingly, eTreppid respectfully submits that this Court order Montgomery immediately to satisfy  
2 his discovery obligations in the manner set forth above, or face terminating sanctions.

3 Dated: May 19, 2008.

4  
5 /s/

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**PROOF OF SERVICE**

I, Meena Dalluge, declare:

I am employed in the **City of Reno, County of Washoe, State of Nevada**, by the law offices of Hale Lane Peek Dennison and Howard. My business address is: **5441 Kietzke Lane, Second Floor, Reno, Nevada 89511**. I am over the age of 18 years and not a party to this action. I am readily familiar with Hale Lane Peek Dennison and Howard's practice for collection of mail, delivery of its hand-deliveries and their process of faxes.

On May 19, 2008, I caused the foregoing **ETREPPID TECHNOLOGIES, L.L.C.'S AND WARREN TREPP'S MEMORANDUM PURSUANT TO MAY 16, 2008 MINUTES OF THE COURT** to be:

  X   filed electronically with the U.S. District Court, and therefore the Court's computer system has electronically delivered a copy of the foregoing document to the following person(s) at the following e-mail addresses:

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1 I declare under penalty of perjury under the laws of the United States of America that the  
2 foregoing is true and correct, and that this declaration was executed on May 19, 2008.

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